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83-1183
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

NEW MOTOR VEHICLE BOARD,
STATE OF CALIFORNIA,
Petitioner,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Respondent,

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC., and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a denial of due process of law for dealer-members to participate in dealer protest hearings, without any voting authority, as permitted by sections 3050(d) and 3066(d) of the California Vehicle Code, in violation of section 1 of the Fourteenth Amendment to the United States Constitution?

2. For due process purposes is the federal standard identical with that of Article I, section 7 of the California Constitution?

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NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC., and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI

Petitioner New Motor Vehicle Board, State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, rendered in this proceeding on August 25, 1983, and on which a petition for hearing was denied by the California Supreme Court on October 20, 1983.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeal is reported as *Chevrolet Motor Division, etc. v. New Motor Vehicle Board* (1983) 146 Cal.App.3d 533; 194 Cal.Rptr. 270, and is attached to the appendix.

JURISDICTION

As above stated, the judgment of the Court of Appeal was entered on August 25, 1983. Thereafter a timely petition for hearing was denied by the Supeme Court of California on October 20, 1983, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

THE STATUTE INVOLVED

The principal statutes involved in this case are sections 3050 subdivision (d) and 3066 subdivision (d) of the California Vehicle Code, as amended in 1979. (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) Said amendments provide that "a member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article."

The comprehensive Code, providing for a New Motor Vehicle Board, its powers and duties, is contained in section 3000, et seq., of the California Vehicle Code.

CONSTITUTIONAL ARTICLES

Section 1, Amendment XIV, of the United States Constitution provides, in pertinent part, that:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The California Constitution, Article I, section 7, provides in pertinent part that:

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. . . ."

STATEMENT OF THE CASE

Respondent Chevrolet notified its dealer, 49er Chevrolet, located in Angels Camp, California, of its intention not to renew its dealer franchise when it expired. Pursuant to section 3060[1] the dealer filed a protest. Under section 3060 Chevrolet could not lawfully terminate a dealer's franchise until the protest was heard by the New Motor Vehicle Board. The manufacturer was required to show, at the hearing, that it possessed good cause for terminating the franchise. §§ 3061, 3066(b).

In ascertaining whether or not good cause exists, the Board considers a number of factors, as enumerated in section 3061, such as, for example, the amount of business transacted by the franchisee, magnitude of investment by the franchisee, whether the franchisee fails to fulfill warranty obligations.

The composition of the Board is determined by section 3001, which provides for five (5) public members (non-dealers), and four (4) dealer-members. The dealer-members are appointed by the Governor, who also appoints three (3) of the public members. One public member is appointed by the Speaker of the Assembly, and the other by the Senate Rules Committee.

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[1]All references to code sections are to the California Vehicle Code.

The dealer-members are permitted to participate in protest hearings, but they do not possess a vote, as set forth in section 3066(d).

After a hearing, the Board sustained 49er Chevrolet's protest, and Chevrolet sought a petition for writ of mandate in the San Francisco Superior Court, on several grounds. Primarily, it asserted that it was denied an impartial tribunal by reason of the presence of the dealer-members during the adjudicatory process. The trial court agreed, and issued its writ on the constitutional challenge, plus one other ground, which is not at issue before you. The Court of Appeal considered only the constitutional issue, and affirmed the judgment below. The Board, the real party in interest, and the intervenor, Northern California Motor Car Dealers Association, et al., then petitioned the State Supreme Court for a hearing, asserting several challenges, among which was one that, where a tribunal decides a case on other grounds, it should defer consideration of the constitutional issue, and also on grounds that the amendments to the respective statutes were in fact constitutional.

The California Supreme Court, the highest in the State, denied the petition, without comment, on October 20, 1983.

Although in its petition to the trial court Chevrolet asserted that the dealer-members' participations violated the California Constitution as well as the United States Constitution, neither the trial court nor the Court of Appeal indicated that the decision was predicated on the California Constitution. Both forums spoke only of a denial of due process. (Minute Order, California Court of Appeal's

Clerk's Transcript, page 237, lines 1-5 and page 237, line 26 to page 238, line 15, and Court of Appeal decision.)

REASONS FOR GRANTING THE WRIT

1. The Court Below Acted On The Federal Due Process Clause, And Did Not Even Consider A Separate, California Constitutional Standard

Although the manufacturer included the California Constitution in its petition for writ of mandate, it seems clear that neither the trial court nor the Court of Appeal considered it as a separate, or different, basis for arriving at its decision. Indeed, no California cases striking down statutes for failure to comply with the California due process clause were presented to either the trial or appellate courts. Possibly this is because there is no California case law on the subject as it pertains to a civil matter.

The case that was cited, and relied upon below, was that of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983. That case, in turn, relied upon decisions of this court, such as *Tumey v. Ohio* (1927) 273 U.S. 510; 71 L.Ed. 749; 47 S.Ct. 437; *Ward v. Village of Monroeville* (1972) 409 U.S. 57; 34 L.Ed.2d 267; 93 S.Ct. 80; and *Gibson v. Berryhill* (1973) 411 U.S. 564; 36 L.Ed.2d 488; 93 S.Ct. 1689. While it is true that other federal decisions were noted in *American Motors,* no California cases were cited, or considered, since no favorable California case law (to the challengers), had been developed relating to its due process clause.

Since the appellate court in this case relied on *American Motors,* and that case in turn relied on the federal cases, it is clear that only the Fourteenth Amendment due process clause was the basis for the decision.

The appellate court did mention one California case, that of *Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781; 171 Cal.Rptr. 590. But *Andrews* is not on point in that the California Supreme Court, in deciding *Andrews,* did not consider any California appellate decisions on due process.

Actually, the few California cases that have considered the State's due process clause have concluded that it *is identical* in scope and purpose with the due process clause of the federal constitution. *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 20; 94 Cal.Rptr. 904; *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 245; 22 Cal. Rptr. 309.

Although recently, in dicta, the California Supreme Court indicated it was not necessarily bound by the same standard, in the case of *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367, fn. 21; 113 Cal.Rptr. 449, the expression was not necessary to the decision rendered, and is therefore but dicta. *No court yet, in California, has applied a different standard* to the State's due process clause than that applicable to the federal standard. Certainly neither of the state courts below did, so they are looking to this court, and its decisions, for the correct standard.

And, it is submitted, the state forums erred in concluding that the statutes violated due process.

2. Participation By The Dealer-Members Does Not Violate Due Process Principles

The most salient point in the litigation below was that the state judiciary concluded as a matter of law that participation by non-voting dealer-members in the adjudica-

tive process was an inherent denial of due process, without need for evidence to demonstrate an actual bias, or "financial stake" on the part of the litigators.

This conclusion ignores such cases as *Dugan v. Ohio* (1928) 277 U.S. 61; 72 L.Ed. 784, 48 S.Ct. 439, where a challenge of "imputed bias" was made to a "mayor-judge" on grounds his salary was paid from the general fund in which fines he levied were deposited. The court concluded his relationship to the fund was too remote to infer bias. Thus, by inference, this Honorable Court required more than just a conclusion, but actual evidence as to bias. As noted in the Court of Appeal decision, no challenge or evidence of actual bias was ever submitted in the instant case.

This Court's precedential decision in *Withrow v. Larkin* is also applicable herein, and further supportive of the requirement of a showing of actual bias, or adverse interest. *Withrow v. Larkin* (1975) 421 U.S. 35; 43 L.Ed.2d 712; 95 S.Ct. 1456. In that case you refused to hold, as a matter of law, that a licensing board was a biased tribunal and you further held that bias could be established only when it can be shown that an adjudicator has a direct pecuniary interest in the outcome of the dispute, or has been the target of personal abuse from one of the parties to the dispute over which he presides, or considers.[2]

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[2]The California Appellate Court failed to consider an administrative regulation of the Board which expressly provides for a factual challenge to any member of the Board. Title 13, California Administrative Code, Section 551.1. (Copy of Text attached in appendix.) The Court also ignored section 3010, which provides that a quorum for protest hearings only requires three (3) public members. (Copy attached, appendix.)

No evidence was ever introduced in these proceedings to demonstrate an adverse interest, pecuniary or otherwise, on the part of any of the dealer-members. California Administrative Code, Title 13, section 551.1 provides for such factual challenges, and thus assures full due process to all parties, including the manufacturers.

In accordance with *Withrow*, this court also handed down a similar decision in *Hortonville District v. Hortonville Association* (1976) 426 U.S. 482; 49 L.Ed.2d 1; 96 S.Ct. 2308. (No showing of financial or personal interest on the board of the deciding body.)

3. Protection Of Automobile Dealers From Arbitrary Treatment By Manufacturers Is A Matter Of Great National Importance, As Recognized By This Court, And It Should Correct The American Motors Error

Once before this Court had been called upon to examine a constitutional issue relating to California's Automobile Franchise Act, as originally enacted in 1973 (Stats. 1973, ch. 996.) *New Motor Vehicle Board of California v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100-101; 58 L.Ed.2d 361; 99 S.Ct. 403. As the Court noted, at pages 100-101:

> "The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. California's version is its Automobile Franchise Act."

See, too, the footnote (4) at page 100 of *Orrin W. Fox Co.* wherein it is cited the report of the Congressional Committee as reported in 1956, and the further footnotes on the purpose of these laws at pages 101-102, footnotes 5-7.

Moreover, the issue of "due process" has cropped up in other states with similar laws, and the results have been different than the California Court of Appeal in *Chevrolet*. Cf. *Ford Motor Company v. Pace* (Tennessee 1960) 335 S.W.2d 360, 367; *General GMC Trucks, Inc. v. General Motors Corp.* (Georgia 1977) 239 Ga. 373; 237 S.E.2d 194, 195-196; *General Motors Corp. v. Capitol Chevrolet Company* (Tennessee 1983) 645 S.W.2d 230, 235-238.

Interestly, in *Capitol Chevrolet Company* the Court specifically rejected the *American Motors* holding. In ruling on the contention that all dealers have a pecuniary interest adverse to manufacturers, the Court said: "This is no attenuated and speculative, in absence of actual interest or bias, that we are simply unable to accept it." (645 S.W.2d at 237.)

The bare majority decision, 2-1, in *American Motors* fairly represents an anomaly in the construction of due process. It defies logic and common sense. On what basis can one conclude that a Mercedes dealer-member has an adverse bias, financial, personal, or otherwise, to the manufacturer of Chevrolets or Fords? Such a dealer-member could just as easily, conceivably, harbor a bias toward the Cadillac dealer who appears before him as the protestant to a franchise termination. But can even that fact be assumed? We suggest not. Let the parties prove the purported bias by facts, by evidence, by declarations.

The distinction between the statutes struck down in *American Motors* and in the instant case, is of course, that the prior law permitted the dealer-members to vote in the hearings while the amended statutes do not. *American Motors* was therefore not clear precedent in

the instant case, and, furthermore, it represents an erroneous analysis of due process, as previously indicated. In addition to the cases cited above, several other federal decisions are contra to the conclusions of *American Motors*. See *Laird v. Tatum* (1972) 409 U.S. 1; 925 S.Ct. 2318; 33 L.Ed.2d 154; *Smith v. Phillips* (1982) ..... U.S. .....; 102 S.Ct. 940; 71 L.Ed.2d 78; *Lopez v. Henry Phipps Plaza South Inc.* (2nd Cir. 1974) 498 F.2d 937; *Wolkenstein v. Reville* (2nd Cir. 1982) 694 F.2d 35. California's misconception of what constitutes due process demands correction, which only this Court can give.

CONCLUSION

Due process is a flexible concept, not subject to hard and fast rules, and must be determined from the peculiar facts of each individual case. *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895; 81 S.Ct. 1743, 1748; 6 L.Ed.2d 1230; *Mathews v. Eldridge* (1976) 424 U.S. 319, 334; 96 S.Ct. 893; 47 L.Ed.2d 18.

California's Automobile Franchise Act, and its administrative regulations, contains safeguards to insure that valuable due process rights are not violated. Absent evidence of actual bias, there is no basis for concluding that dealer-member adjudicators, lacking any voting rights, prejudice and deny a manufacturer a fair tribunal.

The decisions below rested on the due process clause of the United States Constitution, and, because of the grossly erroneous interpretation rendered, this Honorable Court should correct the State of California's error.

DATED: January 12, 1984

Respectfully submitted,

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(Appendices follow)

Appendix A

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 3, No. A015529

In the Supreme Court of the State of California
In Bank

Chevrolet Motors Divisions, Etc., Respondent

v.

The New Motor Vehicle Board, Appellant;
49er Chevrolet et al., Real Parties in Interest
and Appellants

Grodin, Jr., did not participate.

[Filed Oct. 20, 1983]

Petitions of appellants DENIED.

/s/ Bird

Chief Justice

Appendix B

Certified for Publication

In the Court of Appeal of the State of California

First Appellate District,
Division Three

A015529

Super. Ct. No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Plaintiff and Respondent,

v.

The New Motor Vehicle Board,
Defendant and Appellant;
49er Chevrolet, et al.,
Real Parties in Interest and Appellants.

[Filed Aug. 25, 1983]

This appeal is from a judgment granting a peremptory writ of mandamus, ordering that a decision of the state's New Motor Vehicle Board (the Board) be set aside. Appellants are the Board, real party in interest 49er Chevrolet (49er), and two associations of car dealers, Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers of Southern California, Inc. (Associations), who were granted leave to intervene below. Respondent is Chevrolet Motor Division, General Motors Corporation (Chevrolet).

I

The relevant facts are as follows. Chevrolet notified 49er, its dealer in Angels Camp, that when their existing franchise agreement expired on October 31, 1980, a new agreement would not be offered. 49er protested to the Board pursuant to Vehicle Code section 3060,[1] which provides in pertinent part that "no franchisor shall terminate or refuse to continue any existing franchise" for the marketing of new motor vehicles "unless" the Board "finds . . . good cause for termination or refusal to continue" the franchise. The Board consists of nine members, four of whom are required to be new motor vehicle dealers. (§§ 3000, 3001.) At a hearing on a dealer-manufacturer dispute, the dealer members of the Board may participate, hear, and comment or advise other members, but they may not "decide" the matter. (§§ 3050, subd. (d), 3066, subd. (d).)

After a hearing, the Board sustained 49er's protest. Chevrolet then filed this action, seeking to require the Board to vacate its decision. The trial court granted the petition for writ of mandate on two grounds: (1) participation of dealer board members in the deliberative process, without participation of manufacturers, deprived the manufacturers of an impartial tribunal, violating due process; and (2) the Board was without jurisdiction to hear 49er's protest as the manufacturer neither "terminat[ed] [n]or refus[ed] to continue any existing franchise" within the meaning of section 3060. This appeal followed.

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[1]Unless otherwise indicated, all statutory references are to the Vehicle Code.

II

When the Board was originally established in 1967 as the New Car Dealers Policy and Appeals Board, it functioned much as do other state occupational licensing boards. Among its duties, for example, was the hearing of appeals by licensed dealers from decisions of the Department of Motor Vehicles. (See Stats. 1967, ch. 1397, § 2, p. 3261 et seq.; see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986.) Four of the Board's nine members were required to be "new car dealers." (Stats. 1967, ch. 1397, § 2, pp. 3261-3262.)

In 1973 the Legislature renamed the Board the New Motor Vehicle Board, and added sections 3060 to 3069, which established a series of procedures for the adjudication of disputes between dealers and new car manufacturers. (Stats. 1973, ch. 996, § 16, p. 1967-1971.) Among other duties, the Board was empowered to determine whether there is "good cause" to terminate or refuse to continue a franchise. (§ 3060.) The requirement that four of the Board's members be new car dealers was not changed.

In *American Motor Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, a dealer-franchisee protested a noticed termination to the Board, which found that good cause had *not* been shown. (*Id.,* at p. 985.) As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The superior court granted relief, concluding that sections 3060 and 3066 of the Act violated due process " 'because four of the nine members of the Board are . . . new car dealers, who may reasonably be expected to be antagonistic to franchisors . . . .' " (*Ibid.*)

In a 2-1 decision, the Court of Appeal affirmed, and the Supreme Court denied a petition for hearing. After taking note of "a long history of legal warfare between the automobile manufacturers and their dealers" (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App. 3d at p. 986), the court found it "unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." (*Id.,* at p. 987.)

The court acknowledged that in some instances a dealer Board member might be more financially interested in ruling in favor of the manufacturer, i.e., where the franchise of a competitor was being terminated, or where the dealer wished to ingratiate itself with its own manufacturer. The court viewed this not as fairness, but as an equalizing unfairness. "Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 987-988.)

The court distinguished cases holding that a licensing or regulatory agency may constitutionally be composed in whole or in part of members of the business regulated, on the ground that the members of this Board were no longer merely regulating members of their own occupation. In-

stead, they were regulating the economic and contractual relations of others with members of their own occupation, but ". . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 990-991.)

The court then stated that the Legislature's "requirement that the nine-man Board consist of at least four car dealers" meant that "[i]n effect it [the Legislature] took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 991.) "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*Id.,* at pp. 987-988.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." (*Id.,* at p. 992, original emphasis, fn. omitted.)

The court concluded as follows: "What we hold is that the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of

the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992; cf. *General Motors Corp. v. Capitol Chevrolet* (Tenn. 1983) 645 S.W.2d 230; *Ford Motor Company v. Pace* (1960) 206 Tenn. 559 [335 S.W.2d 360]; *Gen. GMC Trucks v. Gen. Motors Corp.* (1977) 239 Ga. 373 [237 S.E.2d 194].)

In reaction to the *American Motors Sales Corp.* decision, the Legislature amended section 3050, subdivision (d), and added subdivision (d) to section 3066 to provide that no member of the Board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 Cal. App.3d 1034, 1037). However, in a 1979 enactment which took effect as urgency legislation, the Legislature again amended the statutes, this time providing that dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any matter involving a dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) According to the Legislature's declaration of urgency, the amendment was necessary "[i]n order that the educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board. . . ." (Stats. 1979, ch. 340, § 3, p. 1207.)

The trial court in this case concluded that the amendments to sections 3050 and 3066 did not "cure the unconstitutionality of the earlier provisions of the statute. . . ." The court reasoned that although dealer-Board members no longer have the right to vote, they have the opportunity fully to participate otherwise in the adjudicatory process, whereas the manufacturers are still left unrepresented.

First, appellants 49er and the Board argue that Chevrolet was not entitled to raise this constitutional question for the first time in the trial court. The general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings. (See, e.g., *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020.) However, a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in proceedings before the agency as a condition of raising the issue in the courts. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251; *Chrysler Corp. v. New Motor Vehicle Bd., supra,* 89 Cal.App.3d at pp. 1038-1039.)

Here Chevrolet was seeking a declaration that the statutes prescribing the Board's membership were unconstitutional. The Board itself could not have granted this relief because the Constitution expressly provides that an "administrative agency . . . has no power . . . [t]o declare a statute unconstitutional. . . ." (Cal. Const., art. III, § 3.5.) There was no waiver of Chevrolet's right to raise the constitutional issue in the trial court in these circumstances.

The Board and 49er also argue that Chevrolet should have requested that the dealer members "recuse" themselves from participating. The dealer members of the

Board constituted almost half of its total membership (see §§ 3000-3001), and as members they were authorized to participate in franchise disputes. (See § 3050, subd. (d).) If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature.

Next, appellants contend that *American Motors* is now of questionable validity, in light of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781. In that case, the Supreme Court held that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias. (*Id.*, at pp. 791, 793-794.) Appellants reason that the group antagonism and economic conflict between dealers and manufacturers mean that car dealer Board members at most may have "crystallized views" about policy issues in adjudications between manufacturers and dealers. After *Andrews*, appellants urge, absent proof of actual bias, such views are not enough to support a holding that an adjudicator cannot provide a fair tribunal.

However, the *American Motors* court did not find the dealer Board members partial because of their views on issues of law or policy; rather, that court squarely held that those Board members had an "economic stake" in every franchise termination case which came before them. The *Andrews* court itself acknowledged that no proof of

actual bias is required for disqualification when a judicial officer has a financial interest in a case. (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at p. 793, fn. 5.)

Appellants then argue that the Board is not a biased tribunal and its action in this case did not deny Chevrolet due process because none of the "adjudicator members" of the Board were biased. Appellants emphasize that there is no contention made that any factor exists which could lead a court to find that the five public members of the Board were or are biased. According to appellants, the dealer members' participation in these proceedings was solely to provide expert advice, a function analogous to that provided to other boards or commissions by agency staff members or assistants. (See, e.g., *Porter County Chapter v. Nuclear Reg. Com'n* (D.C. Cir. 1979) 606 F.2d 1363, 1370-1372.)

We are not persuaded by appellants' attempts to minimize the dealer Board members' role in these proceedings. Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 987.) Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that

process. The Board has numerous powers and duties other than hearing protests by dealers, and the dealer Board members' participation in those other tasks is unrestricted. (See § 3050.) Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal.

In light of our conclusion, we need not consider appellants' contention that the court also erred when it concluded that Chevrolet did not terminate or refuse to continue the franchise within the meaning of section 3060.

Judgment is affirmed.

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P.J.

Feinberg, J.

EXHIBIT A

California Superior Court

City and County of San Francisco

Department No. 26

Honorable Frank W. Shaw, Judge

No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Petitioner,

vs.

The New Motor Vehicle Board,
Respondent,

49er Chevrolet,
Real Party in Interest.

Minute Order

1. Prior to its amendment in 1979, California Vehicle Code Section 3001 mandated that four out of nine members of the New Motor Vehicle Board be new car dealers. Vehicle Code Section 3060, provided that a dealer franchise may not be terminated unless the board finds good cause for said termination. Vehicle Code Section 3066, provided that a hearing must be held when a protest is registered to the proposed termination of a franchise.

In the case of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, the court held that Vehicle Code Sections 3060 and 3066 were unconstitutional in that they were violative of due process

under California Constitution, Article I, Section 7, and under the Fourteenth Amendment to the United States Constitution. The court held that "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors*, supra, p. 992.)

The court further stated that dealer members of the Board have an economic stake in every franchise termination case that comes before them and that it is sufficiently clear that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

In 1979 the legislature amended the vehicle code to provide that "a member of the Board who is a new motor vehicle dealer may participate in . . . hear . . . and comment or advise other members upon, but may not decide, any matter involving a protest" against termination by a manufacturer. (Vehicle Code Sections 3050(d), 3066(d)). According to Senate Bill No. 417, which introduced these amendments, such dealer participation was required to provide educated and needed advice to the Board.

The question presented to the Court in the case at bar is whether said amendments cured the constitutional infirmity found by the court in *American Motors*. This court holds that the 1979 amendments to the Vehicle Code do not cure the unconstitutionality of the earlier provisions of the statute. Although American Motors is not, in this

Court's judgment, dispositive of the issue as to whether or not full participation by dealer-Board members in the hearing process but without the right to vote is unconstitutional, it is the opinion of this court that the participation of dealer-Board members provided for by the 1979 amendments is also unconstitutional under the rationale of American Motors, and for the primary reason that, even though the dealer-Board members no longer have the right to vote, they nevertheless have the opportunity to otherwise fully participate in the adjudicatory process, whereas the manufacturers are left unrepresented, thus depriving the manufacturers of an impartial tribunal. This statutory procedure is clearly violative of due process and is therefore unconstitutional.

It is this Court's opinion that the case of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, does not overrule the Court of Appeals decision in *American Motors*. The interest involved in the decision making process in the case at bar consists of the dealer-Board members' economic interest in the cases being decided. The plurality opinion in Andrews specifically distinguishes the situation where such an economic interest exists, and states that bias is presumed in that situation.

a. Petitioner did not waive its right to raise its constitutional claims in this court by omitting to make those claims before the Board. Petitioner's challenge was directed to the constitutionality of the New Motor Vehicle Board's enabling legislation, and, as such, was properly made in the trial court. Petitioner could not raise its claim before the Board, because an administrative agency created

by the legislature has no power to declare a state statute unconstitutional.

2. As a second ground for granting the writ of mandate, this Court adopts the language of *Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435, and finds that it applies to the case at hand insofar as it holds that in order to have a termination of an existing franchise a franchisee must have some period of time remaining on his written agreement, and that there can be no wrongful refusal to continue an existing franchise unless the franchisee had some contractual right to continuation. In the present case, Petitioner did not deprive the real party in interest of any time remaining on its current Dealer Sales and Service Agreement, nor did it refuse to continue any agreement which gave the real party in interest a right to a continuation.

The *Witt* case points out the stark reality that if this Court were to adhere to the interpretation of Vehicle Code Section 3060, which Respondent argues is correct, it would engraft on the franchise agreement a continuing term that could never be terminated except for one or more of the "good cause" conditions enumerated in the section. Thus, a lease with a definite term and no right to continue could become a contract in perpetuity. This Court finds that the legislature did not intend such a drastic amendment to contractual rights and duties between parties to such a contract when it enacted Vehicle Code Section 3060.

Therefore, the Court finds that the Board acted in excess of its jurisdiction in the case at bar.

3. For the foregoing reasons the Petition for Writ of Mandate is granted.

4. No findings of fact and conclusions of law, as provided by Rule 232 of the California Rules of Court, are required in the case at bar. The Court is deciding this case solely on the above enumerated grounds, both of which were decided by this Court as a matter of law. Attorney for Petitioner shall prepare a form of judgment consistent with the Court's order in accordance with Rule 232 of the California Rules of Court.

DATED: July 31, 1981

/s/ Frank F. Shaw

FRANK F. SHAW
Judge of the Superior Court

EXHIBIT B

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City and County of San Francisco

No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Petitioner,

vs.

The New Motor Vehicle Board,
Respondent,
49er Chevrolet,
Real Party In Interest,

Northern California Motor
Car Dealers Association, Inc.,
and Motor Car Dealers
Association of Southern
California, Inc.,

Additional Real Parties In Interest.

Judgment Granting Peremptory Writ of Mandamus

This matter came regularly before this Court for hearing on May 7, 1981. J. Thomas Rosch, Esq., of McCutchen, Doyle, Brown & Enersen, appeared as attorney for petitioner The Chevrolet Motor Division of General Motors Corporation; Gordon Zane, Esq., Deputy Attorney General, appeared as attorney for the respondent the New Motor Vehicle Board ("the Board"); R. E. Wilmshurst appeared for the real party in interest 49er Chevrolet; and James R. McCall, Esq., appeared as attorney for intervenors the Northern California Motor Car Dealer Association, Inc., and Motor Car Dealers Association of Southern California, Inc. All interested parties having therefore received adequate notice and opportunity to be heard, arguments having been presented, good cause appearing for the writ of mandamus, and the Court having issued its August 3, 1981, Minute Order setting forth the grounds for this judgment.

IT IS HEREBY ORDERED that the cause shall be remanded to the Board for disposition not inconsistent with this Court's Minute Order of August 3, 1981.

DATED: August 20, 1981

/s/ Frank W. Shaw

Judge of the Superior Court

Appendix C

551.1. Challenge.

A hearing officer or board member shall voluntarily disqualify himself and withdraw from any hearing or deliberation in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any hearing officer or board member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns a board member, the issue shall be determined by the other members of the board. Where the request concerns the hearing officer, the issue shall be determined by the board if the board itself hears the case with the hearing officer, otherwise the issue shall be determined by the hearing officer.

NOTE. Authority cited Section 3050, Vehicle Code Reference Section 11723, Vehicle Code.

HISTORY.

1. New Section filed 1-28-76 as an emergency, effective upon filing (Register 76, No. 5).

2. Certificate of Compliance filed 5-28-76 (Register 76, No. 22).

VEHICLE CODE **§ 3050**

§ 3050. Duties

The board shall:

(a) Adopt rules and regulations in accordance with the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2 of the Government Code govern-

ing such matters as are specifically committed to its jurisdiction.

(b) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when any such applicant or licensee submits such an appeal provided for in this chapter from a decision arising out of the department.

(c) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person; and, after such consideration, the board may do any one or any combination of the following:

(1) Direct the department to conduct such investigation of such matter as the board deems reasonable, and make a written report on the results of such investigation to the board within the time specified by the board;

(2) Undertake to arbitrate amicably or resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, * * * distributor branch, or representative;

(3) Order the department to exercise any and all authority or power that the department may have with

respect to the issuance, renewal, refusal to renew, suspension or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as such license is required under Chapter 4 (commencing with Section 11700) of Division 5.

d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. * * * *A* member of the board who is a new motor vehicle dealer may participate in, * * * hear * * *, *and comment or advise other members upon, but may not* decide, any matter involving a protest filed pursuant to Article 4 commencing with Section 3060) of this chapter.

(Amended by Stats.1973, c. 996, p. 1966, § 14, operative July 1, 1974; Stats.1974, c. 384, p. 952, § 1, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1975, c. 943, p. 2108, § 4; Stats.1977, c. 278, p. 1171, § 2, urgency, eff. July 8, 1977; Stats.1979, c. 340, p. 1206, § 1, urgency, eff. July 27, 1979.)

§ 3066. Hearings on protests

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and

consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) * * * *A* member of the board who is a new motor vehicle dealer may participate in, * * * hear * * *, *and comment or advise other members upon, but may not* decide, any matter involving a protest filed pursuant to this article. *Dealer participation shall be recorded in the minutes of the meeting.*

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 6, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1977, c. 278, p. 1172, § 3, urgency, eff. July 8, 1977; Stats.1979, c. 340, p. 1207, § 2, urgency, eff. July 27, 1979.)

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Nos. 83-1183
83-1185
83-1195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

49ER CHEVROLET, RICHARD E. WILMSHURST, NEW MOTOR VEHICLE BOARD, NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC. and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,

Petitioners,

v.

CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

California's Vehicle Code prohibits a new car manufacturer from terminating a franchisee unless the manufacturer proves in an adjudicatory hearing that the dealer's performance was inadequate and therefore gave the manufacturer "good cause" for termination. Cal. Vehicle Code §§ 3060, 3066. The body which adjudicates that issue is the nine-member New Motor Vehicle Board ("Board"), which is required by law to have no manufacturer members but to have four members who are themselves dealers, and whose own franchises can be terminated only for "good cause". Cal. Vehicle Code §§ 3000, 3001. Under the statute, the dealer members fully participate in the adjudicatory decision making process, except they cannot formally vote. Cal. Vehicle Code §§ 3050(d), 3066(d). The trial court held that on the facts of this case, the Board lacked jurisdiction to act under the statute, and the Board dismissed the administrative proceedings solely on that ground. The trial court also held that the statute violated the manufacturers' California and federal due process rights. The court of appeal affirmed on the constitutional ground.

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(3) where dispositive, nonconstitutional state court rulings exist and where the constitutional ruling was made under state law and not under the federal constitution?

2. If jurisdiction exists, should it be exercised here, where the underlying constitutional principles are undisputed and petitioners' only complaint concerns the California courts' application of them to this particular adjudicatory scheme?

3. Do the Board's dealer members, whose own franchises can be terminated under the Vehicle Code only for "good cause", have an economic stake in adjudications which determine what constitutes "good cause"?

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Nos. 83-1183
83-1185
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

49ER CHEVROLET, RICHARD E. WILMSHURST, NEW MOTOR VEHICLE BOARD, NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC. and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,

Petitioners,

v.

CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. ***The Facts of this Case.***

This dispute involves a decision by respondent, Chevrolet Motor Division, General Motors Corporation ("Chevrolet"), not to offer petitioner, 49er Chevrolet, Inc. ("49er") a new automobile franchise when the old five-year agreement expired by its terms. 49er protested that decision to California's New Motor Vehicle Board ("Board") under Section 3060 of the California Vehicle Code. (Board Pet., p. A-3) That section,

where applicable, prevents a manufacturer from terminating an existing dealer until after the Board holds an adjudicatory hearing and determines that the manufacturer had "good cause" for its action. Sections 3060(a), 3066.[1]

The Board held a hearing and sustained 49er's protest. Chevrolet petitioned the Superior Court for the City and County of San Francisco for judicial review. 49er's trade associations, the Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc. ("Intervenors") intervened as parties.

The superior court set the Board's decision aside. Specifically, the superior court followed *Witt v. Union Oil Co.*, 99 Cal. App. 3d 435 (1979) and held that Section 3060 did not apply because 49er's franchise had expired by its terms and the Board therefore lacked statutory jurisdiction. (Board Pet., p. A-3) The superior court also followed another California decision, *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977), and held that the statute violated Chevrolet's California and federal due process rights because it permitted those with an economic stake in the outcome to participate in the adjudicatory decision making process. (Board Pet., pp. A-13, A-14) In reaching the latter conclusion, the superior court addressed, and rejected, petitioners' contention that *American Motors* had been overruled by another California decision—*Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781 (1981). (Board Pet., p. A-15)

49er, the Board and Intervenors appealed. The court of appeal affirmed, again holding that *American Motors* laid down the law in California and that *American Motors* had not been overruled by *Andrews*. (Board Pet., pp. A-4 through A-10; 146 Cal. App. 3d at 537-40) In the light of its constitutional ruling, the court did not reach the superior court's jurisdictional ruling. (Board Pet., p. A-11; 146 Cal. App. 3d at 541) The California Supreme Court denied a hearing, with no justice voting for a hearing. (Board Pet., p. A-1)

Following the finality of the court of appeal's decision and further proceedings in the superior court, the Board set its prior decision aside and dismissed 49er's protest, solely on the

[1] Unless otherwise indicated, all section references are to the California Vehicle Code.

jurisdictional ground. (Appendix, p. A-1) 49er then filed a new proceeding in the court of appeal and asked that court to review the Board's jurisdictional ruling. The court of appeal refused to stay the Board's decision pending review of it, and directed 49er to advise it as to the outcome of other litigation between the parties. (Appendix, p. A-2) We turn to that other litigation next.

2. *The Related Litigation.*

Petitioners present this case in a vacuum. They do not mention other related litigation between the parties. That litigation does not rest on the constitutional or jurisdictional rulings involved here, but holds, following two adjudicatory hearings, that Chevrolet's decision to cease business relations with 49er was right on the merits because it was based on "good cause". The related litigation independently establishes the correctness of Chevrolet's action, and it therefore bears on whether this is an appropriate case for Supreme Court review. The facts of that related litigation are these:

Following the Board's decision in this case, 49er continued to engage in a course of conduct, including a virtual cessation of selling Chevrolet vehicles, which warranted its termination as a Chevrolet dealer. Accordingly, on September 18, 1981, Chevrolet notified 49er that commencing November 30, 1981, it would cease business relations with 49er.

49er protested that decision to the Board. The Board held a hearing on that second protest and overruled it, specifically holding on the merits that Chevrolet had "good cause" for its action. (Decision in Protest No. PR-348-82, pp. 17-18)

49er petitioned the Calaveras County Superior Court for judicial review. That court held a second adjudicatory hearing, applied its independent judgment and upheld the Board on all counts. (Statement of Decision in Calaveras County Action No. 11169, filed September 19, 1983) 49er appealed to California's Court of Appeal for the Third District, and that appeal is now pending.

3. *The History of the Statute.*

The Board is a nine member body. It is required by law to be made up of four new car dealers, five "public" members and no manufacturers. Sections 3000, 3001. One of the Board's

primary jobs is to adjudicate manufacturer-dealer disputes, including disputes over whether the manufacturer has demonstrated that the dealer's inadequate performance as a franchisee constitutes "good cause" for its termination.

As originally enacted, California's statute allowed all nine Board members to vote in dealer termination cases. That scheme was declared unconstitutional nearly seven years ago in *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

The Board did not ask this Court to review that state court decision. Instead, the legislature amended the statute to eliminate dealer participation. Cal. Stats. 1977, Ch. 278, §§ 3, 2. But two years later, the legislature again amended the statute so that dealer participation was reintroduced. As it stood at the time of the decision below, the statute provided:

> "A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a [dealer] protest filed pursuant to this article." Cal. Stats. 1979, Ch. 340, § 2; Vehicle Code §§ 3050(d), 3066(d).

The 1979 amendment was adopted as an urgency measure because it was deemed necessary for the "educated and needed advice" of the dealer members, held biased by *American Motors*, to be "utilized in the decision making process of the board." Cal. Stats. 1979, Ch. 340, § 3.

In this case the dealer members did in fact participate in the decision making process. (CT 184)

SUMMARY OF ARGUMENT

This case is not a Supreme Court case, regardless of how one views the constitutional ruling below. That is so because the superior court also held that the Board lacked statutory jurisdiction—an issue admittedly not before the Court (Board Pet., p. 4)—and 49er's protest was dismissed solely on that basis. (Appendix, p. A-1) That jurisdictional ruling has not been overturned by the court of appeal, and the two adjudicatory rulings upholding Chevrolet's action on the merits are now

pending before another court of appeal. In the light of those other dispositive rulings, it is unlikely that the constitutional issue will continue even to exist. (Part I, below)

Moreover, despite petitioners' considerable efforts to portray the decision below as raising a federal question, it does not do so, but rests squarely on California law. In fact, the court's opinion cites just one federal authority, and then only to distinguish it. (Part II, below)

Finally, even if the court of appeal had decided a federal question, there still would be no issue worthy of this Court's review. This Court has fully considered the relevant due process requirements, and this case presents no occasion to revisit that territory. The controlling principles of law are clear, and the petitions do not claim otherwise. They just object to the court of appeal's application of them to this particular California Board and statute—an issue which, even in California, lacked sufficient significance to warrant further judicial review. (Part III, below)

REASONS FOR DENYING THE WRIT

I. IT IS UNLIKELY THAT ANY CONSTITUTIONAL ISSUE WILL CONTINUE TO EXIST.

The bottom line of this case is whether Chevrolet should be prevented by the Board from giving effect to Chevrolet's decision not to offer 49er a new franchise agreement when the old agreement expired according to its terms. The superior court held that the Board could not prevent Chevrolet from so acting because it lacked statutory jurisdiction, and the Board's dismissal of 49er's protest rests solely on that state law ground. (Appendix, p. A-1)

Moreover, the propriety of Chevrolet's decision is also established by other litigation between the parties. In 1981 Chevrolet decided to stop dealing with 49er because of 49er's conduct subsequent to the Board's hearing in this case. The Board reviewed that decision and approved it on the merits, finding that it was based on "good cause." (Board Decision in Protest No. PR-348-81, pp. 16-19) The Superior Court for the County of Calaveras independently reviewed the evidence, and it, too, upheld Chevrolet's decision as being based on "good

cause." (Statement of Decision in Calaveras County No. 11169, filed September 19, 1983) That decision is now pending before the California Court of Appeal for the Third District.

Neither of those state law decisions is before the Court. One establishes that the Board lacked statutory jurisdiction, and the other that Chevrolet's decision was entirely fair and proper because based on "good cause." Each constitutes an independent termination of this dispute without regard to the constitutional ruling made by the court below.

Thus this case presents no issue at all on which the Court could act unless two other state court decisions are overturned. More particularly, the due process issue decided below would continue to be alive only if 49er were successful in overturning the San Francisco Superior Court's jurisdictional ruling *and* the Board's merits decision which the Calaveras County Superior Court has independently reviewed and upheld.[2] This Court certainly should not grant a petition in a case like this in which the Court's ability to decide the purportedly raised issue is so doubtful. See *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (Constitutional issue moot where specific dispute resolved on other grounds prior to Supreme Court decision).

II. THE DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court has jurisdiction to review state court decisions only where federal questions are involved. 28 U.S.C. § 1257. Accordingly, this Court has long held that it will not review a state court judgment which rests on an adequate and independent state ground. See, *e.g.*, *Jankovich v. Toll Road Commission*, 379 U.S. 487, 489 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281 (1961); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

[2] Where, as in the related litigation, the superior court has applied its independent judgment and upheld the agency's adjudicatory decision, the appellate court's power as to the sufficiency of the evidence "begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding [of] fact." *12319 Corporation v. Business License Comm'n*, 137 Cal. App. 3d 54, 64 (1982).

Petitioners labor long and hard to eliminate the California constitution and the California courts' reliance on it. *American Motors*, 69 Cal. App. 3d at 985; Board Pet., pp. A-13, A-14. Thus we are told that California law is "nonexistent", and that the California courts' citation to the state constitution is "meaningless", that it "merely mimicked" counsel's citation of it, and that its use was intended by the court as a "gambit" to "immunize" its decision from review by this Court. (Intervenors Pet., p. 8) But petitioners' attempts are in vain and their attacks on the lower courts' motives are spurious. The decision below rests on the California constitution; there can be no doubt about that.[3]

First, "[t]he California Supreme Court has long regarded the Declaration of Rights of the California constitution [Article I, which includes the due process clause] as a charter of independent significance." J. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Cal. L. Rev. 273, 277 (1973). The petitioners agree. The Board found one California Supreme Court case saying that the California Declaration of Rights is independent; Intervenors concede that there are at least four. (Intervenors Pet., p. 7) See also *Mandel v. Hodges*, 54 Cal. App. 3d 596, 616 (1976); *Committee to Defend Reproductive Rights* v. *Myers*, 29 Cal. 3d 252, 261 (1981). In fact, the California constitution itself makes clear that "Rights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I, § 24.

Second, the court of appeal's opinion cites just one federal case, and then only to distinguish it. (Board Pet., p. A-10; 146 Cal. App. 3d at 540) Given that, it is plain from the opinion itself that the lower court was relying on independent state grounds and was not deciding a federal issue.

Petitioners try to get around that inherent obstacle by arguing that because the California precedent, *American Motors*, cited federal cases, the decision below must be deemed to have been made under compulsion of federal law because it cites *American Motors*. (Board Pet., pp. 5-6; Intervenors Pet.,

[3] Indeed, the Board's petition cites the California due process clause as being involved in the issues it raises, and that is the *only* constitutional provision the Intervenors cite. (Board Pet., p. 3; Intervenors Pet., p. 2)

pp. 5-8) But it is only the decision in this case, not *American Motors*, which could possibly be subject to review by this Court, and petitioners' position is therefore a bootstrap argument at best.

Third, petitioners fail to point out that recent California authority, which was cited to the court of appeal, compels the conclusion that the dealer members have an economic stake in dealer termination cases which renders their participation fundamentally unfair under California law. In *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807 (1981), the California Supreme Court held that an arbitration clause requiring a concert promoter to submit disputes with a performer to the board of the performer's union does not provide an adjudication with "minimum levels of integrity" and therefore was unconscionable and unenforceable. 28 Cal. 3d at 826-27. The court reasoned that the union's board was an entity "whose interests are so allied with those of the party that, for all practical purposes, [it] is subject to the same disabilities which prevent the party himself from serving" as an adjudicator. 28 Cal. 3d at 827. See also *Hope v. Superior Court*, 122 Cal. App. 3d 147 (1981), *cert. denied sub nom., Shearson Hayden Stone, Inc. v. Hope*, 456 U.S. 910 (1982). Thus, the dealer members' economic interest is established by California law. That should put an end to this case because the constitutional principle preventing those with an economic interest from being adjudicators is unquestioned and unquestionable.

Finally, there can be no doubt that the court below was deciding a state law issue when its decison is read in the light of the arguments which petitioners made to that court. Although Intervenors, alone, made the same federal arguments to that court which they make here (Intervenors Op. Br., pp. 7-9)[4], all of the petitioners, including Intervenors, relied heavily on the

[4] 49er's briefs to the court below did not even mention *Friedman v. Rogers*, 440 U.S. 1 (1979); *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976); or *Withrow v. Larkin*, 421 U.S. 35 (1975), the principal cases on which petitioners rely here. The Board's brief mentioned only *Withrow* but then only in passing and only as further support for its state law argument based on *Andrews v. Agricultural Relations Board*, 28 Cal. 3d 781 (1981). (Board Op. Br., p. 14)

California Supreme Court's decision in *Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781 (1981), and urged reversal on the grounds of *Andrews*. Thus petitioners argued that *Andrews* "overruled" *American Motors* (49er Op. Br., pp. 7-10; Board Op. Br., pp. 12-15; Intervenors Op. Br., pp. 15-16) and that it provided the "crucial" statement of "the current California law . . . ." (Intervenors Op. Br., p. 15; Intervenors Reply Br., p. 2)[5] The court of appeal squarely rejected that state law argument (Board Pet., pp. A-9, A-10; 146 Cal. App. 3d at 540), and the fact that it did so without even mentioning Intervenors' federal arguments makes clear that the decision below rests on state law.[6]

III. THE CONSTITUTIONAL ISSUE RAISES NO QUESTION WORTHY OF THIS COURT'S REVIEW.

This Court has recently addressed the due process principles relevant to this case on several occasions.[7] Those cases have established a clear body of law for the lower courts to apply. Petitioners do not claim otherwise.

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[5] Given petitioners' heavy reliance on *Andrews*, their criticism of the lower court for citing that case—saying that it is not "on point"—is amazing. (Board Pet., p. 6; Intervenors Pet., p. 6)

[6] 49er's petition also asks this Court to decide whether the lower court properly ruled on its claim respecting the challenge procedures under California Administrative Code, Title 13, Section 551. (49er Pet., pp. 10-13) That, of course, is not a federal question over which this Court would have jurisdiction.

[7] *Gibson v. Berryhill*, 411 U.S. 564 (1973) (because of possible pecuniary interest in outcome, optometrists in private practice could not adjudicate whether it was unlawful for optometrist to practice as a salaried employee of a corporation); *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976) (school board members may participate in decisions to terminate teachers because they did not have the kind of personal or financial stake in the decision that would create a conflict of interest); *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrist who adhered to the "commercial" practice of optometry had no right to be regulated by a board sympathetic to the commercial practice of optometry but did have a right to fair and impartial hearing in any disciplinary proceedings conducted against him by state optometry board); *Withrow v. Larkin*, 421 U.S. 35 (1975) (board with both investigatory and adjudicatory functions not biased); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor cannot be impartial judge where he is responsible for village finances, and court fines, fees, and costs provide a substantial portion of village funds); see also *Wall v. American Optometric Ass'n*, 379 F.Supp. 175 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).

Instead, petitioners attack both the decision below and its California predecessor, *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977), as aberrations, saying that they reflect a "neglectful approach" and that they are "clearly wrong under all applicable precedents" and are "close to an [sic] usurpation of power. . . ." (Intervenors Pet., p. 14) Thus the petitions, assuming their accusations to be correct, by their own admission raise no important, undecided issue of law; they simply ask the Court to change what they perceive to be a "clearly wrong" decision in this particular case. But this Court sits to decide "special and important" issues, Rule 17.1; it "does not sit for the benefit of particular litigants . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932).

And that is not all. There are additional reasons why this case presents no occasion for consideration of the constitutional issue, even assuming more guidance from this Court were needed. We establish that next, turning first to the ruling that the dealer members have an economic stake in adjudicating dealer termination cases and second to the ruling that their nonvoting participation in the decision making process violates due process.

A. The Holding That The Dealer Members Have An Economic Stake.

A legislature cannot create an adjudicatory administrative agency and then allow those with an economic stake in the outcome to be adjudicators. That is well settled. See, *e.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781, 793 n.5 (1981); *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d 648, 657 (1980). The courts below applied that settled principle to the particular statutory scheme and adverse economic interests here involved and held that the Board's dealer members, whose own franchises can be terminated only for "good cause", have a personal, economic interest in adjudications which decide whether a manufacturer has proved "good cause" for termination. (Board Pet., pp. A-5, A-9, A-10; 146 Cal. App. 3d at 537, 540-41) Petitioners' claim

that the lower courts' conclusion was in error raises no issue worthy of this Court's review for the following additional reasons:

1. *Issue previously decided.*

First, the decision below rests on the prior California decision of *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977). And petitioners concede that what they ask this Court to review is *American Motors*, saying that it was wrong and that this Court should "correct" it. (Board Pet., pp. 8-10; Intervenors Pet., pp. 9-21; 49er Pet., pp. 5-9) But *American Motors* is a seven year old case against the Board[8] in which there was no petition to this Court and to which the California legislature responded by amending the statute to remove the dealer members' voting presence. (See pp. 3-4, above) Thus in California, the dealer members' economic stake in adjudicating dealer termination cases is something which is long behind us.

2. *No impact beyond this Board.*

Second, a decision by this Court on whether the dealer members have an economic stake in adjudicating dealer termination cases under California's particular statute would have little, if any, impact beyond this case, even assuming it would have an impact in this case. (See Part I, above) As the Board admits, "[d]ue process is a flexible concept" which "must be determined from the peculiar facts of each individual case." (Board Pet., p. 11) Although petitioners say that other states have agencies which deal with manufacturer-dealer relations and that other state courts have upheld those statutes (Board Pet., pp. 8-9; Intervenors Pet., pp. 11, 19, 22-23), they do not and cannot say that the statutes are the same, that the legislative histories establish that their purpose was to evade prior state court rulings or that the constitutional challenges

[8] Intervenors were not parties to *American Motors*. They were, however, amici. See *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

involved in the cases on which petitioners rely were the same as that decided below.[9]

Intervenors also say that "hundreds, if not thousands" of regulatory agencies include members of the regulated profession (Intervenors Pet., p. 11), apparently thereby intending to imply that the decision below will impact the viability of those agencies. But neither *American Motors* nor the decision below in any way questions participation by the regulated in an agency's rulemaking functions. To the contrary, both decisions distinguish that situation and make clear that their holding applies only to adjudicatory functions where the agency is adjudicating concrete disputes in which its members have an economic interest. *American Motors*, 69 Cal. App. 3d at 992 n.7; Board Pet., p. A-11; 146 Cal. App. 3d at 541. The lower court was hardly departing from settled due process principles in articulating a difference between an agency's legislative and adjudicatory functions. See *Friedman v. Rogers*, 440 U.S. 1, 18-19 (1979); *Concerned Citizens v. Pine Creek District*, 429 U.S.

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[9] Petitioners cite three cases from other states which they say are contrary to the California law as laid down by *American Motors* and the decision below. (Board Pet., p. 9; Intervenors Pet., pp. 18-19) The first is *Ford Motor Co. v. Pace*, 335 S.W.2d 360, 367 (Tenn.), *app. dismissed, Ford Motor Co. v. Pace*, 364 U.S. 444 (1960). But *Pace* involved a statute under which an agency could revoke a manufacturer's license for improper conduct vis-a-vis its dealers; it did not permit the agency to adjudicate particular private disputes. See Tennessee Code Annotated § 55-17-114. Moreover, *Pace* was a declaratory judgment action seeking invalidation of a dealer board for all purposes and without regard to the function it was performing. The court rejected that broad attack, observing that regulatory agencies are commonly composed of those from the regulated profession. 335 S.W.2d at 367. The court below and the *American Motors* court recognized that principle and correctly held it inapplicable here, where the agency's adjudicatory, not rulemaking, functions are involved. *American Motors*, 69 Cal. App. 3d at 992 n.7; Board Pet., p. A-10; 146 Cal. App. 3d at 540-541.

General Motors Corp. v. Capitol Chevrolet Co., 645 S.W.2d 230 (Tenn. 1983), simply reiterates *Pace*, 645 S.W.2d at 232, and it is not persuasive here for the same reasons.

General GMC Trucks, Inc. v. General Motors Corp., 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (Ga. 1977), involved the agency's decision to deny a license for a dealer to operate in a new, already serviced trade area. The decision therefore concerned the agency's essentially regulatory function of controlling the dealer's ability to expand its operations—an issue as to which the interests of dealers and manufacturers are not inherently adverse. The Georgia court explicitly limited its holding to the agency's function there involved. 237 S.E.2d at 195.

651, 656-57 (1977) (Rehnquist, dissenting); *Wall v. American Optometric Ass'n*, 379 F.Supp. 175, 180, 188-89 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).

In short, the lower courts applied the correct constitutional principles to this case. Their conclusion that the dealer members' economic interest was constitutionally unacceptable depended on the "peculiar facts" respecting this statute, including the fact that there has been a "long history of legal warfare" between automobile manufacturers and their dealers over franchise operations. *American Motors*, 69 Cal. App. 3d at 986. It is not this Court's function to second-guess that application. As the Court put it in *Gibson v. Berryhill:*

> ". . . applying the standards taken from our cases, [the District Court] concluded that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no reason on this record to overturn its conclusion . . . ." 411 U.S. at 579.

3. *Decision clearly correct.*

Third, *American Motors* and the decision below are clearly correct. This is not the occasion to argue the merits, but because petitioners rely primarily on their views respecting the merits (Intervenors Pet., pp. 9-21; Board Pet., pp. 8-10; 49er Pet., pp. 5-9), we respond briefly:

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court held unconstitutional a statute authorizing a board of optometry consisting of optometrists in private practice for their own account to adjudicate whether it was unprofessional conduct or unlawful for an optometrist to practice as a salaried employee of a corporation. 411 U.S. at 567, 579. In so holding, this Court did not require proof that money would directly pass into the adjudicators' pockets as a result of the particular decision they were then making, 411 U.S. at 578-79, and thereby rejected what appears to be petitioners' merits argument here. (See Intervenors Pet., pp. 12-21; Board Pet., p. 9; 49er Pet., pp. 5-9)

See also *Wall v. American Optometric Ass'n*, 379 F.Supp. 175, 188-89 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).[10] Nor are other federal decisions to the contrary. Each addresses a different issue in a different context.[11]

Finally, all of petitioners' federal arguments were made to the court below; the fact that it held as it did without even discussing those federal authorities only proves that its decision rested on California constitutional principles. (See Part II, above)

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[10] The Board suggests that a dealer member may, in some case, also be biased against the particular dealer which comes before the Board. (Board Pet., p. 9) Such individualized bias is the type which must be specially shown and is what the Board's challenge procedures are all about. (Board Pet., pp 7-8; 49er Pet., pp. 10-13) But the possibility of such individualized bias against a particular dealer hardly negates the dealer members' personal economic interest in all dealer termination cases.

Intervenors refer to some extra-record statistics respecting the Board's rulings on dealer terminations (Section 3060 hearings) and additions or relocations of dealers. (Section 3062 hearings) (Intervenors Pet., p. 9, n.9) But due process is violated when an adjudicator has an economic interest; a party challanging that interest need not establish that the adjudicator's voting record was against him. If that were the standard, this Court would be required to readjudicate the merits of all of the cases which came before the Board to determine whether the Board decided them correctly.

[11] Intervenors say that *Friedman v. Rogers*, 440 U.S. 1 (1979) "directly overruled" *American Motors*. (Intervenors Pet., p. 13) But there this Court held that Texas could require a majority of its optometry board to be members of an association which supported the state's legislatively enacted rules. 440 U.S. at 17-18. The Court made clear that its holding related to an agency's rulemaking, and not to its adjudicatory, functions. 440 U.S. at 18.

49er claims that it was *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), which "overruled" *American Motors*. (49er Pet., p. 9) That is wrong too. There this Court held constitutional the Vehicle Code's provision which temporarily prevented a manufacturer from acting pending a Board hearing. The Court made clear that the statute would be constitutional only if the Board were an "impartial tribunal", 439 U.S. at 107-08—an issue which was not before it and which it did not decide.

Both Intervenors and the Board also rely on *Withrow v. Larkin*, 421 U.S. 35 (1975), and *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976). (Board Pet., pp. 7-8; Intervenors Pet., pp. 12-13) But neither of those cases dictates reversal. *Withrow* held that a board with both investigatory and adjudicatory functions was not biased because "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55. That has nothing to do with a case like this where

(footnote continued on following page)

B. Nonvoting Participation by Those With An Interest Violates Due Process.

As the Board notes, the statute *American Motors* struck down provided for the dealer members' voting participation in dealer termination cases. (Board Pet., p. 9) Following *American Motors* the legislature first amended the statute to eliminate dealer participation and then reamended it to grant dealer members full participation in the decision making process so long as they did not formally vote. (pp. 3-4, above) The second amendment was introduced because the Board said it lacked the capacity to decide dealer termination disputes without the dealer members' participation, and the legislature made clear that it was enacted so that the dealer members' influence could be "utilized in the decision making process of the board." Cal. Stats. 1979, Ch. 340, § 3; Senate Transportation Committee Analysis of S.B. 417 (1979); Assembly Transportation Committee Analysis of S.B. 417 (1979).

The lower courts held that the dealer members' nonvoting participation in the deliberative process violated due process. As the court of appeal explained, the dealer members

> "are permitted to participate actively in hearings on dealer-manufacturer disputes, hear evidence, and comment upon and advise other Board members in such matters. In other

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(footnote continued from previous page)

the Board members have a personal economic stake in the outcome and this Court said so. *Id.* at 47.

Hortonville related to a school board's action as manager of the school district, which this Court expressly said "was not an adjudicatory decision." 426 U.S. at 495. While the board members may have had a point of view by reason of their being managers, this Court also expressly held that they did not have a "personal or financial stake in the decision", 426 U.S. at 491-92, as the dealer members were held to have here under California law. It is the distinction between a "point of view" and an "economic stake" which makes the petitioners' circuit court cases inapplicable as well. See *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974) (adjudicator said to be too "management oriented"); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500 (Ct. Cl. 1977) (tribunal claimed to be biased because majority was employed by Travelers Insurance Company and would therefore assertedly favor the government (not Travelers, a nonparty)); *Wolkenstein v. Reville*, 694 F.2d 35 (2d Cir. 1982), *cert. denied, Wolkenstein v. Reville*, 103 S.Ct. 2452 (1983) (school superintendent said to have an "official motive" against teachers).

Finally, Intervenors cite *Smith v. Phillips*, 455 U.S. 209 (1982). (Intervenors Pet., p. 16) That case concerned juror misconduct—a challenge which, unlike economic interest, requires proof of actual bias. 455 U.S. at 215.

words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process." (Board Pet., p. A-10, A-11; 146 Cal. App. 3d at 541)

Although the Board's petition makes passing reference to that aspect of the court of appeal's decision (Board Pet., pp. 9-10), neither it nor the other petitions presents any reason for this Court to grant a writ with respect to it. Accordingly, we do not address the point further other than to note:

1. Due process demands that adjudicatory decisions be impartial. If a member of an adjudicatory tribunal has an interest in the case, that member cannot participate at all even if he or she does not vote. If the interested member did participate, he or she would influence the voting members; the member's economic interest would become a part of the decision making process; and the adjudication would no longer be impartial.

2. California law clearly establishes that members of an adjudicatory tribunal influence each other and that all must be qualified to vote. See *Moles v. The Regents of the University of California*, 32 Cal. 3d 867, 874 (1982) (participation by justice who did not hear oral argument invalidates decision even though his vote was unnecessary to decision because of his ability to influence the other panel members); *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d 648, 659-60 (1980) (adjudicatory decision by agency invalidated where doctor who initiated charges sat on board but did not vote); *Commission on California State Government Organization & Economy v. Fair Political Practices Committee*, 75 Cal. App. 3d 716, 722 (1977) (nonvoting commission members who were in "solely advisory" capacity were subject to conflict of interest laws because in "real life" they were capable of directly altering the decisions of executive agencies). Indeed, the *only* law cited to the court of appeal on this subject was California, not federal.

CONCLUSION

The petitions should be denied.

Dated: February 17, 1984.

Respectfully submitted,

McCutchen, Doyle, Brown
& Enersen

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Chevrolet Motor Division,
General Motors Corporation

LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28

The undersigned, counsel of record for Respondent Chevrolet Motor Division, General Motors Corporation, certifies that all of respondent's United States and Canadian subsidiaries are wholly owned except Motor Enterprises, Inc., which is owned in part by the United States Small Business Administration.

Richard C. Brautigam
Counsel of Record
for Respondent

APPENDIX A

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of 49ER CHEVROLET, *Protestant,* VS. CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION, *Respondent.*	**Protest No. PR-271-80** **ORDER OF DISMISSAL**

PURSUANT TO THE Minute Order dated July 31, 1981, and Judgment dated August 20, 1981, of the Honorable Frank W. Shaw, Judge of the Superior Court of the State of California, City and County of San Francisco, in the matter of *Chevrolet Motor Division, General Motors Corporation* vs. *New Motor Vehicle Board;* 49er Chevrolet, Real Party in Interest; Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc., Additional Real Parties in Interest (San Francisco Superior Court No. 777974) *(49er Chevrolet* vs. *Chevrolet Motor Division, General Motors Corporation,* Protest No. PR-271-80), the New Motor Vehicle Board hereby sets aside its Decision of January 28, 1981, rendered in the above-entitled Protest, and dismisses said Protest for lack of jurisdiction.

DATED: January 5, 1984

NEW MOTOR VEHICLE BOARD

By ROBERT J. BECKUS

Robert J. Beckus
Public Member
New Motor Vehicle Board

Court of Appeal of the State of California

in and for the

First Appellate District

Division Three

49ER CHEVROLET, et al., *Petitioners,* vs. The NEW MOTOR VEHICLE BOARD, *Respondent,*	**No. A025621 San Francisco Superior Court No. 777974**

GENERAL MOTOR DIVISION
GENERAL MOTORS CORPORATION,
Real Party in Interest.

BY THE COURT:

Petitioner's request for a stay is denied. Petitioner to advise this court of the results in 49er Chevrolet v. New Motor Vehicle Board, 3 Civ. 23426, when that appeal to the Third District of the Court of Appeal has been resolved.

WHITE, P. J.

_____ P. J.

Dated JAN 20 1984